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ATTORNEY GENERAL OF TEXAS

June 22, 2015

Ms. Laurel E. Huston
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OR2015-12248

Dear Ms. Huston:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 570159 (UMC File No. HM-15-034).

The El Paso County Hospital District d/b/a University Medical Center of El Paso (the "district") received a request for all e-mail correspondence between two specified accounts from January 1, 2013 to the date of the request.¹ You state you will release some responsive information to the requestor. You further state the requestor has agreed to the redaction of patient information and identifiers. You indicate you will redact e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under sections 552.103, 552.109, and 552.111 of the Government Code. In

¹We note the center sought and received clarification of this request from the requestor. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

addition, you state release of this information may implicate the proprietary interests of El Paso Children's Hospital and Children's Health System of Texas and the privacy interests of the owner of one of the specified accounts. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code §§ 552.304 (interested third party may submit comments stating why information should or should not be released), .305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions to disclosure under the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert a portion of the submitted information is confidential because it is subject to a confidentiality agreement. However, information is not confidential under the Act simply because the party submitting the information to a governmental body requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from El Paso Children's Hospital or Children's Health System of Texas explaining why the information at issue should not be released. Therefore, we have no basis to conclude either of these third parties has a protected proprietary interest in the information at issue. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the district may not withhold any of the information at issue on the basis of any proprietary interest El Paso Children's Hospital or Children's Health System of Texas may have in it.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You state El Paso Children's Hospital is contractually obligated to repay the district various costs and has been in arrears on payments since October 2012. You further state the district and El Paso Children's Hospital entered into a forbearance agreement in April 2013 and that agreement was amended in February 2014. You inform us El Paso Children's Hospital

defaulted on that agreement and presently owes the district more than \$90,000,000. You assert that, since February 2014, the district and El Paso Children's Hospital have been involved in settlement negotiations, which are ongoing. You also state both parties have engaged outside counsel to resolve this matter, either by agreement or litigation. Based on your representations and our review, we find the district reasonably anticipated litigation when it received the request for information. We also find you have established the submitted information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree section 552.103(a) is applicable to the submitted information.

However, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). We note the opposing party to the anticipated litigation has seen or had access to some of the submitted information, which we have marked. Therefore, the district may not withhold this information under section 552.103(a). However, we agree the district may withhold the remaining information under section 552.103(a). We note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

We now turn to the information seen by the opposing party to the anticipated litigation. Section 552.109 of the Government Code excepts from disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov’t Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the common-law privacy standard under section 552.101 of the Government Code, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found., v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find you have failed to demonstrate how any of the information at issue constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Further, as of the date of this letter, we have not received comments from the individual you notified explaining why her information should not be released. Consequently, we have no basis to conclude that individual has a privacy interest in the submitted information. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 611 at 1 (1992) (common-law privacy). Therefore, the district may not withhold any of the information at issue under section 552.109 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Open Records Decision No. 677 at 4-8 (2002); *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances . . . that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat’l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

The district contends the information at issue consists of attorney work product. However, as previously discussed, this information was seen by the opposing party to the anticipated litigation. Therefore, because a non-privileged party has had access to this information, the work product privilege under section 552.111 has been waived. Accordingly, the district may not withhold any of the information at issue as attorney work product under section 552.111 of the Government Code.

Section 552.111 of the Government Code also encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage

open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, we determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party, with which the governmental body establishes it has a privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties interests are adverse.

The district states the information at issue consists of advice, opinions, and recommendations regarding policymaking matters. However, as previously noted, the information at issue was shared with the opposing party to the anticipated litigation. The district has not demonstrated it shares a privity of interest or common deliberative process with this party. Thus, we find the district has failed to show how the information at issue consists of internal communications containing advice, opinions, or recommendations regarding policymaking matters of the district. Accordingly, the district may not withhold any of the information at issue under the deliberative process privilege of section 552.111 of the Government Code.

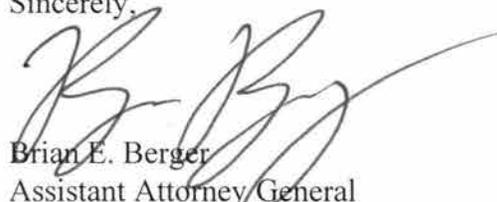
We note the information at issue contains an additional e-mail address that is subject to section 552.137 of the Government Code.³ Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail address we have marked is not of a type excluded by subsection (c). Therefore, the district must withhold the personal e-mail addresses you have marked, as well as the personal e-mail address we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, with the exception of the information we have marked for release, the district may withhold the submitted information under section 552.103 of the Government Code. The district must withhold the personal e-mail addresses you have marked, as well as the personal e-mail address we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Brian E. Berger
Assistant Attorney General
Open Records Division

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³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 570159

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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